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MCCARTHY, SWEENEY & HARKAWAY, P.C.

SUITE 700

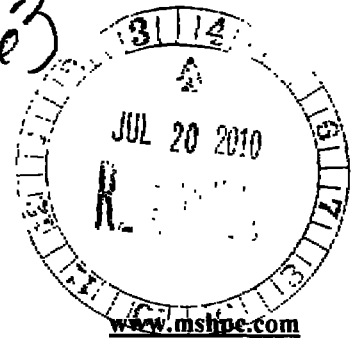
1825 K STREET, N.W.

WASHINGTON, D.C. 20006

(202) 775-5560

FAX (202)-775-5574

ANDREW P. GOLDSTEIN
apg@mshpc.com



July 20, 2010

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Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Finance Docket No. 35387
Ag Processing Inc A Cooperative – Petition for Declaratory Order

Dear Ms. Quinlan:

Enclosed please find a signed original and 10 copies of Ag Processing Inc A Cooperative – Petition for Declaratory Order. Also enclosed is a check in the amount of \$1,000 as filing fee for the same.

Please date-stamp the enclosed extra copy and return it with our messenger.
Thank you.

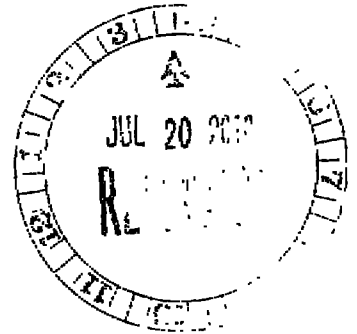
Sincerely,

Andrew P. Goldstein

Andrew P. Goldstein
Attorney for Petitioner

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 35387

ENTERED
Office of Proceedings

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Public Record

AG PROCESSING INC A COOPERATIVE –
PETITION FOR DECLARATORY ORDER

FEE RECEIVED

JUL 20 2010

**SURFACE
TRANSPORTATION BOARD**

FILED
JUL 20 2010
**SURFACE
TRANSPORTATION BOARD**

Andrew P. Goldstein
John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, PC
Suite 700
1825 K Street, N.W.
Washington, DC 20006
(202) 775-5560

Attorneys for Petitioner

Dated: July 20, 2010

1. Ag Processing Inc A Cooperative (“Ag Processing” or “Petitioner”) is a cooperative corporation owned by grain producers and grain elevators. It is headquartered at 12700 West Dodge Street, Omaha, NE 68154.

2. Norfolk Southern Railway Company (“NS” or “Defendant”) is a Class I railroad subject to the jurisdiction of the Board, with headquarters in Norfolk, VA.

3. Ag Processing makes shipments that move over the lines of NS.

4. Pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721, Ag Processing seeks a declaratory order from the Board to terminate the controversies and resolve the uncertainties arising from NS Tariff 8002-A, Item 5000, effective July 14, 2010 (the “Tariff”), attached as Appendix A hereto.

5. The Tariff addresses overloaded cars (except, for some unknown reason, cars loaded with coal, coke, or iron ore) and imposes penalties of \$578 per car for certain cars determined by NS to have been overloaded, in addition to demurrage, switching charges, reweighing charges, and other charges which apply to the overloaded car.¹

6. The Tariff applies to shipments originated on NS or received by NS from a connecting carrier. Ag Processing originates grain shipments from a facility served by NS at Pleasant Hill, Iowa and also tenders substantial quantities of cars loaded with grain or grain products that originate elsewhere to NS at Chicago and Kansas City for delivery to points in the Midwest and Northeast. All of these shipments move on a year-round basis.

¹ Although penalties for overloads vary according to commodity, the shipments of Ag Processing could all be subject to the \$578 per car charge, plus demurrage, switching and additional charges. Demurrage charges of \$5,775 per train apply per each 12 hours that a train is held until sufficient lading has been removed from any car in the train to make that car weight-compliant.

7. The controversy and uncertainty which Ag Processing requests the Board to address and resolve arises because NS has made overload penalties and costs applicable due to “weather conditions” pursuant to the Tariff preamble and Paragraph D of the Tariff, which defines “weather conditions” as including “rain, snow, ice, etc.” If the “overloaded condition is due to weather, charges will be waived if the shipper provides a certified weight certificate showing that the weight of the shipment was at or below the stenciled load limit for the car. Such certificate must be provided within 24 hours of notification of overload....”

8. The waiver, however, is subject to conditions. As set forth in Paragraph D of the Tariff, at the request of consignor or owner, “NS will hold the overloaded car up to 5 days if the certified weight certificate is provided within 24 hours of notification of overload. This is to allow time for the weather condition to be alleviated naturally. If at the end of the 5-day period the weight of the car remains above the stenciled limit for gross weight on rail, it will be the responsibility of the consignor or owner of the shipment to partially unload the car at its expense. Removal of lading must be sufficient to eliminate the overload condition and all applicable charges for demurrage, storage, and reweighing will be assessed. NS will not furnish any personnel, equipment or machinery that may be necessary to partially unload the overloaded car.”²

9. The Tariff penalizes shippers due to weather conditions beyond their control. Although a 5,000 lb. per car tolerance of overloading is permitted with respect to

² The Tariff preamble defines an overloaded car as “a car for which either the net weight is in excess of the car’s load limit or the gross weight is in excess of the track limit at any point along the route of movement.” If Ag Processing consigns a car to a destination on light-weighted rail, Ag Processing light-loads the car to meet rail weight restrictions, but cannot control when NS, for its own operating convenience, may choose to use tracks that are light weight for movement of cars that have been loaded to stenciled limit.

shipments in general pursuant to Paragraph C of the Tariff, where an overload is due to weather there is no 5,000 lb., or other, tolerance. Instead, the weather-overloaded car will be held by NS for up to 5 days after a weight certificate is provided. If at the end of the 5-day period the weight of the car “remains above the stenciled limit for gross weight on rail” (the condition which negates the 5,000 lb. tolerance arising from weather conditions) it becomes the responsibility of the consignor or owner of the shipment to partially unload the car in order to reduce its weight to the stenciled limit for gross weight on rail. Even if there were a 5,000 lb. tolerance, it would be insufficient in many cases to excuse the shipper from incurring charges that it did not cause and cannot control.

10. All shipments originated by Ag Processing are subjected to origin weighing on scales certified by local authorities. Ag Processing does not know if NS scales are certified or where they are located. Ag Processing believes that NS scales are located only or mainly at NS freight yards, which can be separated by hundreds of miles of track.

11. If a car leaves an Ag Processing facility for pickup by NS directly or by any other carrier that delivers cars to NS at Chicago or Kansas City, the car is weighed at origin and the weight of any snow or ice that may be on the car at the time of loading is deducted from the loading capacity of the car. Thus, when a loaded car is tendered by Ag Processing for transportation, its gross vehicle weight will be at or below the loaded stenciled gross vehicle weight maximum, including the weight of any accumulated snow, ice, sleet, or rain on the car at the time it is loaded. NS freight rates are stated on a per car basis and this adjustment by Ag Processing in effect results in the payment of freight rates for the movement of snow and ice.

12. If a car is loaded and shipped without ice or precipitation, the car is loaded by Ag Processing at or below its full permissible weight on rail capacity for the route designated by Ag Processing. During winter months, it is not uncommon for snow or sleet to fall or rain to freeze in NS regions traversed by Ag Processing cars. Those cars not only move along the NS system, exposed to changing weather conditions along the route, but are also stopped and held by NS or its connecting lines at various points for railroad operating reasons. The amount of snow, ice, or other weather related additional weight which may accumulate on a car during a journey across NS is not within the control of Ag Processing.

13. According to the 18th Edition of the *Civil Engineers Pocket-Book*, the weight of ice is 57.2 pounds per cubic foot. The area comprising the top of a covered hopper car of the type normally shipped by Ag Processing is 632.2 square feet. A mere 2 inches of snow and ice on top of the car would add 6,190 lbs. to the car's gross weight. An even lesser amount of ice would require Ag Processing to undergo at its sole cost the cost of partially unloading the car plus paying for demurrage, storage, and reweighing. This is likely to require the retention of contractors suitable to NS to remove lading from the car, a shortfall in Ag Processing's sales commitment, demurrage at a cost of \$105.00 per car per day or \$5,775 per 12 hours per train, approximately \$469.00 in NS switching charges, and reweighing charges of \$130.00 per car. Further, because unloaded lading, if reloaded and moved by NS, is subject to its full carload line-haul charges. so the only practical way to dispose of excess lading is to truck it to a dump and dispose of it at a loss that may amount to several hundred dollars per car, plus replacement value.

14. It is axiomatic that shippers should not be required to pay freight charges except upon the freight they actually load in a car. *Coal, Grain and Computation of Freight Charges*, 326 I.C.C. 382, 385 (1966); *Anaconda Copper Mining Company, Terminal Service*, 266 I.C.C. 387, 391 (1948). If Ag Processing loads a car to its stated weight limits, and not in excess of those limits, it is abiding by NS tariffs, which permit loads up to the maximum stated weight (plus a possible 5,000 lb. tolerance for overloading in all cases except those involving snow, ice., etc.), then that is the shipment for which Ag Processing should be charged at the NS per car rate. To charge Ag Processing more for that shipment is an unreasonable practice in violation of 49 U.S.C. 10702.

15. Ag Processing cannot anticipate weather conditions that will prevail between the time it tenders a car to NS or one of its connections and the time the car is delivered by NS. If Ag Processing were to assume that all winter month shipments on NS would be subject to accumulations of snow, ice, or other weather products, it would have to deliberately underload the car and pay NS to in effect move snow or ice, since the NS rates are based on carloads. The less product loaded in a car, the higher the price per ton to ship the product. To place Ag Processing in that predicament likewise is an unreasonable practice in violation of 49 U.S.C. 10702.

16. The amount of time or location that NS or its connections choose to intermittently hold cars between origin and destination for operating convenience is not within the control of Ag Processing. Nor is any choice that NS may make to utilize light-weight tracks when Ag Processing's routing instructions do not necessitate the use of such tracks. If a car with a clean exterior is in a snow or ice storm while on NS or its connections, accumulates additional weight as a result, and stays in the same place for days at a

time within the control of NS, there is no reason to expect that the accumulated snow or ice will melt within 5 days. Indeed, there is no stated rationale for setting 5 days as the “melting” limit. These provisions of the Tariff also constitute unreasonable practices.

17. In an analogous situation, where demurrage penalties are imposed when a shipper or consignee holds cars beyond specified “free time,” there is an entrenched rule stating that no demurrage can be assessed where the proximate cause of the detention is not within control of the shipper and due diligence was used to avoid such detention. *Ormet Corp. v. Illinois Central R. Co.*, 337 I.C.C. 653, 659 (1970). To avoid culpability, the shipper is not called upon to do “everything in its power” to mitigate, but only what is “reasonable under the circumstances.” *Prince Manufacturing v. Norfolk & Western*, 356 I.C.C. 702, 706 (1978). Where a car in the possession of NS or its connections is tendered within Tariff weight limits but accumulates enough ice, snow, or other weather products while in the possession of a carrier to make it overweight and subject it to the penalties and related charges arising from the Tariff, there is nothing that Ag Processing can do to alleviate those circumstances unless it is deemed reasonable for Ag Processing to forego part of its payload, by unloading the car as the Tariff requires, and thereafter to pay for the movement of snow and ice, as well as demurrage and other consequential costs. That alternative likewise constitutes an unreasonable practice.

18. Ag Processing has attempted to resolve its differences over the new Tariff with NS, but to no avail. After the discussions, the present Paragraph D was added. It continues to penalize the shipper for weather-related overweight cars that have been made overweight by natural conditions beyond the shipper’s control. These conditions may not be limited to snow or ice on the roof of the car, but may well include ice that ac-

cumulates on the undercarriage or sides of the car to an extent that is not possible to calculate in terms of exact weight.

19. Ag Processing recognizes that severely overweight cars may pose a safety hazard. But there are alternatives to the penalties and costs imposed by the Tariff on shippers whose cars are exposed to weather-induced excess weights. One such solution would be for NS to itself remove the snow and ice just as it no doubt removes other impediments to train movements during snow storms.

20. WHEREFORE, Ag Processing requests the Board to institute a declaratory order proceeding; to establish a schedule for the submission of any such additional comments as it deems appropriate; and to resolve the controversy arising from the Tariff regarding the imposition of penalties and costs on shippers due to weather conditions for which shippers are not responsible.

Respectfully submitted,




Andrew P. Goldstein
John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
1825 K Street, N.W., Suite 700
Washington, DC 20006
(202) 775-5560

Attorneys for Ag Processing Inc

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition has been served this 20th day of July, 2010, electronically on the Norfolk Southern Law Department.



Andrew P. Goldstein

NS 8002-A

5TH REVISED PAGE 39

SECTION 5
RULES AND CHARGES GOVERNING OVERLOADED CARS

ITEM 5000

RULES GOVERNING OVERLOADED CARS
(Not applicable on cars loaded with Coal, Coke or Iron Ore)

- ▲ A car for which either the net weight is in excess of the car's load limit or the gross weight is in excess of the track weight limit at any point along the route of movement is defined as an overloaded car; this includes overloaded cars attributable to weather conditions.
- A. NS may elect to stop an overloaded car enroute and hold it on a track where partial unloading may be accomplished. It will be the responsibility of the consignor or owner of the shipment to partially unload the car at its expense. Removal of lading must be sufficient to eliminate the overload condition as defined above. NS will not furnish any personnel, equipment or machinery that may be necessary to partially unload the overloaded car.
- Charges for each such car will be assessed as follows:
1. \$469 per car switching charges.
 2. \$130 per car reweighing charge.
 3. Demurrage of \$105 per car per 24-hour day or fraction thereof, beginning from the time of notification by NS until NS has been advised that lading has been adjusted and the car is ready to move on to destination. No free time will be allowed and charges will apply for all days held, including holidays.
 4. Freight charges pursuant to Item 5010 or Item 5020.
 5. \$578 per car overload charge for each such car that has been determined by NS to have been overloaded by more than 5000 pounds, on all commodities except those listed in 6.
 6. \$1,156 per car overload charge if shipment contains Scrap Iron/Steel (STCC 40211), Pig Iron (STCC 33111), Mill Scale (STCC 33119) Metalizing Plant Products (STCC 33115), or Construction and Demolition Debris (STCC 4029154).
- B. NS may elect to stop a trainload shipment that includes one or more overloaded cars enroute and hold the entire train on a track or tracks where partial unloading may be accomplished. It will be the responsibility of the consignor or owner of the shipment to partially unload each overloaded car at its expense. Removal of lading must be sufficient to eliminate the overload condition as defined above. NS will not furnish any personnel, equipment or machinery that may be necessary to partially unload the overloaded car or cars.

(Continued on next page)

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- ▲ - Change in wording which results in neither increase nor reduction in charges.
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ISSUED JUNE 24, 2010

EFFECTIVE JULY 14, 2010

ISSUED BY
C. J. Orndorff, Director-Marketing Services
NORFOLK SOUTHERN RAILWAY COMPANY, 110 Franklin Road, S. E, Roanoke, VA 24042-0047

NS 8002-A

4TH REVISED PAGE 40

SECTION 5
RULES AND CHARGES GOVERNING OVERLOADED CARS

ITEM 5000 (Continued)

RULES GOVERNING OVERLOADED CARS
(Not applicable on cars loaded with Coal, Coke or Iron Ore)

Charges for each such car will be assessed as follows:

1. \$ 130 per car reweighing charge.
 2. Demurrage of \$5,775 per train for each 12-hour period or fraction thereof, beginning from the time of notification by NS until NS has been advised that lading has been adjusted and the train is ready to move on to destination. No free time will be allowed and charges will apply for all days held, including holidays.
 3. Freight charges pursuant to Item 5010 or Item 5020.
 4. For each such car that has been determined by NS to have been overloaded by more than 5,000 pounds, \$578 per car overload charge.
- C. In the event that overloaded car is delivered to destination without being stopped enroute for partial unloading (whether the overloaded condition is discovered prior to delivery or not), charges for each such car determined by NS to have been overloaded by more than 5,000 pounds will be assessed as follows:
1. \$578 per car overload charge on all commodities except those listed in 2.
 2. \$1,156 per car overload charge if shipment contains Scrap Iron/Steel (STCC 40211), Pig Iron (STCC 33111), Mill Scale (STCC 33119) or Metalizing plant products (STCC 33115), or Construction and Demolition Debris (STCC 4029154).

Freight charges will be assessed pursuant to Item 5030

- ◆D. Where overloaded condition is due to weather (rain, snow, ice, etc), charges will be waived if the shipper provides a certified weight certificate showing that the weight of the shipment was at or below the stenciled load limit for the car. Such certificate must be provided within 24 hours of notification of overload (excluding Saturdays, Sundays, and Holidays). At consignor or owner of the shipment's request, NS will hold overloaded car up to 5 days if the certified weight certificate is provided within 24 hours of notification of overload. This is to allow time for the weather condition to be alleviated naturally. If at the end of the 5 day period the weight of the car remains above the stenciled limit for gross weight on rail, it will be the responsibility of the consignor or owner of the shipment to partially unload the car at its expense; removal of lading must be sufficient to eliminate the overload condition and all applicable charges for demurrage, storage, and reweighing will be assessed. NS will not furnish any personnel, equipment or machinery that may be necessary to partially unload the overloaded car.

◆ - Reduction.

ISSUED JUNE 24, 2010

EFFECTIVE JULY 14, 2010

ISSUED BY
C. J. Orndorff, Director-Marketing Services
NORFOLK SOUTHERN RAILWAY COMPANY, 110 Franklin Road, S. E, Roanoke, VA 24042-0047

NS 8002-A

ORIGINAL PAGE 40.1

SECTION 5
RULES AND CHARGES GOVERNING OVERLOADED CARS

ITEM 5010

FREIGHT CHARGES APPLICABLE ON LADING

A. WHEN FORWARDED TO ORIGINAL DESTINATION

When a car is loaded beyond its maximum carrying capacity, the lading will, when practicable, be transferred to a car of sufficient capacity. When a car of sufficient capacity is not available or if car is loaded beyond track weight limitation, so much of the lading as may be necessary to reduce lading weight below the weight restrictions of the car and/or weight restriction on rail will be transferred to another car, the entire shipment to be charged at actual weight and carload rate from point of origin to destination.

ITEM 5020

REMOVED FROM OVERLOADED CARS

A. WHEN DISPOSED OF AT POINT OF UNLOADING.

When the excess from an overloaded car(s) is disposed of at point of unloading, freight charges on the excess tonnage will be based on the applicable carload rate and actual weight from original point of origin to unloading point or original destination, whichever results in the lower freight charges.

ISSUED JUNE 24, 2010

EFFECTIVE JULY 14, 2010

ISSUED BY
C. J. Orndorff, Director-Marketing Services
NORFOLK SOUTHERN RAILWAY COMPANY, 110 Franklin Road, S. E, Roanoke, VA 24042-0047